No. 93-1286

In The

Supreme Court of the United States

October Term, 1993

AMERICAN AIRLINES, INC.,

Petitioner,

v.

MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL, ROBERT NELSON and P.S. TUCKER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should review the decision of the Illinois Supreme Court, which, per the Court's instructions on remand, applied the *Morales* test in determining that Section 1305 of the Airline Deregulation Act does not pre-empt state law claims arising out of American's breach of contract and fraud in connection with its AAdvantage marketing club, because the claims based on the AAdvantage club are too tenuous, remote or peripheral to airline rates, routes and services to warrant pre-emption.

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OPINIONS BELOW

Besides the opinions and judgments delivered in this case listed in Petition for Writ of Certiorari ("Petition") filed by American Airlines, Inc. ("American") at 1, the following opinions and judgments have been delivered in this case: (1) *Wolens v. American Airlines, Inc.*, 565 N.E.2d 258 (Ill. App. Ct. 1990) (App. at 31a);[1] *Wolens v. American*

[1] References to the Appendix to the Petition are cited as "App. at ___." References to the Appendix to Brief of Respondents in Opposition to Petition for Writ of Certiorari are cited as "Opp. App." at ___.

Airlines, Inc., No. 88 CH 7554, slip op. (Ill. Cir. Ct. Mar. 20, 1989) (App. at 41a); (5) *Wolens v. American Airlines, Inc.*, No. 88 C 8158, 1988 U.S. Dist. LEXIS 12,026 (N.D. Ill. Oct. 25, 1988) (decision to remand state court action) (Opp. App. at 1a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the express pre-emption provision of the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. App. § 1305(a)(1), cited in the Petition, the statutory section which saves existing remedies is particularly relevant here:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. § 1506.

STATEMENT OF THE CASE

A. The AAdvantage Program.

Plaintiffs-respondents ("plaintiffs") are members of American's "frequent flyer" club, known as the "AAdvantage Program." American and the other AAdvantage Program participants – including hotels, bank credit cards, a long distance telephone network, car rental agencies, money market funds, sellers of merchandise and other airlines – offer club members credits which they can

use to secure various benefits offered by the participants. Anyone who joins the AAdvantage Program can earn awards without ever flying, and can use those awards to obtain significant non-airline travel benefits offered by participants.[2]

American induced plaintiffs to apply for membership in the AAdvantage Program by telling them that the greater the AAdvantage credits earned, the greater the benefits they would be entitled to receive. *See Wolens* Complaint ¶ 2; *Tucker* Complaint ¶ 2 (App. at 49a, 62a). Plaintiffs accepted American's offer to become Program members, and proceeded to accumulate substantial credits by using the facilities and benefits of participants in the AAdvantage Program, even if doing so was more costly and less convenient than using non-participants' facilities and benefits. *See Wolens* Complaint ¶¶ 3, 4; *Tucker* Complaint ¶ 5 (App. at 49a-50a, 62a-63a).

In the late spring of 1988, American *retroactively* imposed restrictions on members' use of their previously earned AAdvantage credits, unilaterally altering the terms of its contract with the AAdvantage Program members. *See Wolens* Complaint ¶ 14; *Tucker* Complaint ¶ 14 (App. at 52a, 65a). These restrictions substantially reduced the value of the AAdvantage credits previously

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[2] While non-airline travel benefits are involved in the AAdvantage Program, American claims that such benefits "were not challenged" here. Petition at 3 n.2. This is misleading. By breaching its contracts with members in the AAdvantage Program, American diminished the value of the AAdvantage credits earned by club members from both American and the non-airline participants.

earned by Program members. *See Wolens* Complaint ¶ 4; *Tucker* Complaint ¶ 6 (App. at 49a, 63a). Although American had reserved the right to restrict, suspend, or otherwise alter aspects of the Program, it never reserved the right to do so *retroactively* so as to diminish the value of the AAdvantage credits previously earned and accumulated by Program members.[3]

The AAdvantage Program is, in essence, a marketing tool for American to compete with other airlines for customers, as American acknowledges. *See* Petition at 3. American solicited customers to join the AAdvantage Program separate from soliciting customers to buy American's flight services – that is, tickets to fly on American. American's airplane tickets do not contain the AAdvantage Program terms, but detail the labor exchange inherent in air travel. Similarly, the AAdvantage program contracts are completely independent of the ticketing contract. Thus, when American breached its contracts with and defrauded AAdvantage members, it breached a non-flight contract unrelated to its services, its rates or its routes. The effect of American's breach of contract and fraud was to damage plaintiffs, who purchased goods and services of American and its Program participants with the promise that they would receive credits with a

[3] While American suggests that its modifications to the AAdvantage Program have been beneficial (*see* Petition at 4), that assertion is not supported by any facts in the Record. More fundamentally, American does not have the right to breach its agreement with Program members in ways which decrease the value of the AAdvantage awards even if other modifications to the Program increase the value of those awards. Contract law does not provide an "offset" mechanism.

certain value, only to find that American unilaterally and retroactively reduced the value of those credits.

B. The Proceedings Below.

American's argumentative description of the proceedings below misstates several relevant facts. First, American selects certain phrases from paragraph 13 of Wolens' complaint and couples them with phrases from other sources to create a totally misleading impression of plaintiffs' claims. *See* Petition at 5. In fact, paragraph 13 makes no specific claim but merely describes the AAdvantage Program terms which American unilaterally changed, causing damages. Plaintiffs never alleged – and do not concede – that their claims for relief relate to airline services or rates.

Next, American's description of the Illinois Supreme Court's initial decision (Petition at 6) omits a significant basis for its finding that plaintiffs' claims were not pre-empted: the fact that the breach of contract and fraud claims arising from the AAdvantage Program were only tangentially related to American's rates, routes and services.

Finally, American misstates the methodology and ruling of the Illinois Supreme Court decision at issue here. *See* Petition at 9. Contrary to American's claim, the court did not adopt any test for pre-emption other than the test required by *Morales*. Moreover, the court did not base its decision on just two specific reasons – rather, it fully considered all the facts alleged and applied the *Morales* test to reach its conclusion that the claims were not pre-

empted. For an accurate description of the court's ruling, *see infra* at 11-13.

SUMMARY OF ARGUMENT: THERE ARE NO CONFLICTS OR IMPORTANT FEDERAL ISSUES JUSTIFYING REVIEW

Morales recognized that Section 1305 did not shield airlines from all state law claims based on their wrongdoing. Rejecting any bright-line rule, the *Morales* Court provided lower courts with the analytical framework to determine whether the facts in each case showed a sufficient relation to airline rates, routes and services to be pre-empted.

The Illinois Supreme Court faithfully applied the *Morales* framework to the facts here. Thus, to accept certiorari on this case would mean to reexamine the carefully considered – and recent – ruling in *Morales*. Just last month, the Court rejected an opportunity to revisit *Morales* in *West v. Northwest Airlines*, 995 F.2d 148 (9th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3551 (1994), a case in which the Ninth Circuit, applying *Morales*, found that Section 1305 did not pre-empt a state law claim for compensatory damages based on bumping.

Contrary to American's claim, the decision of the Illinois Supreme Court does not conflict with the Seventh Circuit decisions in *Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 603 (1993) or *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 114 S. Ct. 1948 (1990). Neither of these cases dealt with frequent flyer

programs. Moreover, *Statland* involved a challenge to American's ticket refund policies. The Seventh Circuit found pre-emption based on the "obvious" close connection between the amount of ticket refunds and the rates charged for the ticket – a relationship that is not present here. *Illinois Corporate Travel*, which was decided before *Morales*, involved advertising of airline ticket rates, again a situation where the claims obviously related to rates.

Nor does the Illinois Supreme Court ruling conflict with post-*Morales* cases from other circuits. American claims that *Wolens* conflicts with three cases from the Ninth and Fifth Circuits. But none of these cases address pre-emption with respect to frequent flyer programs. The Ninth Circuit cases – *Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2956 (1992), and *West*, 995 F.2d 148 – each considered pre-emption in the same way *Wolens* did, evaluating whether their particular claims and facts were sufficiently connected to airline rates, routes and services to be pre-empted. The Fifth Circuit case, *Hodges v. Delta Airlines*, 4 F.3d 350 (5th Cir. 1993), *petition for reh'g en banc granted*, 12 F.3d 426 (5th Cir. 1994), is currently being reheard *en banc* by the Fifth Circuit after the original panel urged that earlier Fifth Circuit law was wrong and that Section 1305 should not pre-empt the claims in that case. The Fifth Circuit's analysis in *Hodges* is consistent with the *Wolens* analysis.

Finally, the decision below does not raise any important question of federal law requiring this Court's review and resolution. American's purported conflict between *Wolens* and Department of Transportation ("DOT") interpretations of the ADA is a ruse. Tracking the language of

Section 1305, DOT concluded that general state law may apply to frequent flyer programs unless the claims relate to airline rates, routes and services. DOT has chosen not to closely regulate frequent flyer programs, leaving it to the judiciary to apply this Court's guidelines in *Morales* in determining whether Section 1305 pre-empts claims based on frequent flyer programs.

American's assertion that allowing this case to proceed "will force all national airlines to conform their nationwide practices to the particular strictures of Illinois law" says only that allowing the claims means American cannot breach its contracts or defraud consumers with impunity. That result certainly does not diverge from federal law or the laws of any other state.

Even if this Honorable Court agrees that this case requires review, it should summarily reject American's statement of the issues. Both issues are misstated in that they fail to express the factual underpinnings for the decision – facts which *Morales* dictates the lower courts should review. Moreover, American takes the word "essential" in the Illinois Supreme Court opinion out of context, fabricates a standard out of it, and then asks this Court to reject the standard.

I. THE ILLINOIS SUPREME COURT'S DECISION IS CONSISTENT WITH *MORALES*.

A. The Illinois Supreme Court Correctly Followed The Analysis Which This Court Prescribed In *Morales*.

1. *Morales* Recognizes Limits To The Scope Of Pre-emption Under Section 1305.

In *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), this Court analyzed pre-emption under Section

1305 with respect to a narrow issue. The question was whether state attorneys general could enforce specific prosecutorial guidelines adopted by the National Association of Attorneys General ("NAAG") regulating the advertising of airline rates. The Court interpreted Section 1305 to pre-empt "[s]tate enforcement actions having a connection with or reference to airline 'rates, routes, or services'. . . . " *Id.* at 2037. This Court found that the NAAG guidelines "obviously" relate to rates since they "establish binding requirements as to how tickets may be marketed if they are to be sold at a given price." *Id.* at 2039. The *Morales* Court stressed that the guidelines would not simply prevent "market distortion caused by 'false' advertising," but would actually limit air carriers' "ability to communicate fares to their customers." *Id.* at 2040.

Significantly, the Court in *Morales* acknowledged limits to pre-emption under Section 1305, observing that " 'some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Id.* (*quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983).[4] As an example, the Court stated that Section 1305 does not necessarily pre-empt

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[4] In *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), decided after *Morales*, the Court reaffirmed the basic principle that there is a "presumption against the pre-emption of state police power regulations." *Id.* at 2618. This presumption against pre-emption is applicable to traditional state claims, such as the garden-variety breach of contract and consumer fraud claims asserted by plaintiffs. *See, e.g., California v. ARC American Corp.*, 490 U.S. 93, 101 (1989); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146, *reh'g denied*, 374 U.S. 858 (1963).

regulation of non-price aspects of fare advertising. *Id.* The Court declined to establish a bright-line rule for distinguishing between claims which are pre-empted and those which are not pre-empted, writing: " 'The present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line.' " *Id.* (*quoting Shaw*, 463 U.S. at 100 n.21).

Morales also recognized the continuing vitality of the statutory savings clause which provides: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506. The Court held that if the state claim or regulation did not have a sufficient relationship to an airline's rates, routes, or services, it would be saved by Section 1506. *Morales*, 112 S. Ct. at 2037.

American would have this Court find that Section 1305 shields air carriers from all state law claims that have any arguable connection to rates, routes or services. But *Morales* rejected that result and American has provided no reason for the Court to reconsider *Morales*. By declining to establish a bright-line rule, the Court in *Morales* determined that lower courts must evaluate whether specific claims are pre-empted. That evaluation – based on *Morales'* holding that claims tenuous, remote or peripheral to rates, routes and services are not pre-empted – necessarily requires the lower court to evaluate the specific facts in each case. Thus, the *Morales* Court established an analytical framework to evaluate pre-emption, not a hard rule to be applied indiscriminately.

Where the lower court applies *Morales'* analytical framework to facts not considered in *Morales*, its ruling will be consistent with *Morales*.

2. The Illinois Supreme Court's Fact-Specific Inquiry Complies With The Analysis Approved In *Morales*.

Despite the "spin" which American places on the decision of the Illinois Supreme Court, the lower court's pre-emption analysis is fully consistent with *Morales*. The Illinois Supreme Court held that plaintiffs' ordinary state claims for money damages have only a "tangential" relation to American's rates, routes and services. App. at 7a. Thus, the court concluded that Section 1305 did not pre-empt plaintiffs' claims for money damages. *Id.*

To reach this result, the court closely followed *Morales'* analytical framework. App. at 7a. First, the court considered the nature of the contract that American breached and the wrongdoing complained of. The court described the claims, recounting plaintiffs' contention that American retroactively changed the AAdvantage Program so as to diminish the value of AAdvantage club members' previously-earned credits. The court also noted plaintiffs' contention that the AAdvantage Program was developed and utilized as a marketing device. Next, the court considered whether the claims were tenuous, remote, or peripheral to airline rates, routes and services. As part of that analysis, the court found that plaintiffs' damage claims did not seek to establish the rates that airlines must charge, to determine the routes that airlines must fly, or to dictate the services that airlines must

provide. App. at 6a. The court also noted that frequent flyer programs are "not an essential element to the operation of an airline," finding that "the airline industry functioned successfully for decades" without frequent flyer programs. App. at 6a.

The court specifically referred back to its previous holding that plaintiffs' claims for money damages bore only a "tangential" relation to airline rates, routes and services. It noted that the dictionary definition of "tangential" includes the word "tenuous", one of the *Morales* standards for non-pre-empted claims. The court concluded again that the claims bore only a tangential relation to airline rates, routes and services, and found that Section 1305 did not pre-empt the claims, in accordance with *Morales*. App. at 6a-7a.

3. The Illinois Supreme Court Did Not Limit Pre-emption To State Law Claims That Relate To "Essential" Airline Operations.

The Illinois Supreme Court characterized the AAdvantage Program as not "essential" to airline operations. In so describing the Program, the court did not put forward a new legal standard for pre-emption as American repeatedly suggests. Rather, it considered whether the Program was essential to airline rates, routes and services as a factor in applying *Morales* to the facts. It was a reasonable factor to evaluate. Since it is likely that an "essential" service is not tenuous, remote or peripheral to airline services, it is completely consistent with *Morales* to evaluate whether a particular service is "essential" to

assist the court in determining whether a particular factual claim is "tenuous", "remote" or "peripheral" under the *Morales* guidelines.[5]

B. The Result In *Wolens* Does Not Conflict With The Result In *Morales*.

In *Morales*, the Court was presented with the question of whether Section 1305 pre-empted specific prosecutorial guidelines which directly regulated the manner in which airlines advertised rates. The Court noted that Section 1305 was designed "[t]o ensure that the States would not undo federal deregulation with regulation of their own. . . . " *Id.*, 112 S. Ct. at 2034. The Court determined that prosecutorial enforcement of the NAAG fare advertising regulations would impose regulations closely relating to airline "rates", and could undo federal deregulation. *Id.* at 2039-40.

In stark contrast with the proposed fare advertising regulations at issue in *Morales*, plaintiffs' garden-variety damage claims, if permitted to proceed, will not "undo federal deregulation." Plaintiffs do not seek to impose any restrictions on American's air transportation business. They seek only money damages for American's fraud and for breach of the contractual obligations which American voluntarily assumed in operating the AAdvantage club. A damage award will not compel American to

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[5] Ironically, American has no quarrel with the Ninth Circuit's evaluation of whether ground transportation was "essential" to Federal Express' services in *Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2956 (1992). *See infra* at 20-21.

change or advertise its rates in any manner. Nor will monetary relief for American's wrongful conduct alter American's airline services. A damage award will not affect who is transported on American, when they are transported, where they are transported, or the circumstances under which they are transported.

American's assertion that, if successful, plaintiffs' claims will require American to follow the NAAG frequent flyer guidelines is a transparent attempt to fabricate a similarity between this case and *Morales*. *Morales* addressed only the NAAG fare advertising guidelines – not the NAAG frequent flyer guidelines. Further, the state attorneys general in *Morales* sought specifically to enforce the fare advertising guidelines. Plaintiffs here do not wish to enforce the NAAG frequent flyer guidelines; they seek only to obtain monetary relief for American's wrongdoing.

Contrary to American's argument, *Morales* does not address – much less foreclose – any distinction between damage claims and claims for injunctive relief. Under *Morales*, the Court gave lower courts the analytical framework to evaluate any type of claim. Moreover, the propriety of the Illinois Supreme Court's decision that plaintiffs' injunctive claims are pre-empted is not at issue. Plaintiffs have not appealed that decision. Nor, obviously, has American, which prevailed on that point below.[6]

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[6] Notwithstanding this Court's statement in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959), that regulation can be exerted through a damage award as well as through preventive relief, this Court has declined on several recent occasions to find the regulatory effects of state law direct or substantial enough to justify pre-emption. *See Cipollone*, 112 S. Ct. at 2628 (Blackmun, concurring). *See, e.g., English v. General Electric Co.*, 496 U.S. 72, 85 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) ("The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional [state workers' compensation] award provision") (*citing Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256, *reh'g denied*, 465 U.S. 1074 (1984)). With respect to plaintiffs' breach of contract claim, the regulatory effect of state law is not even at issue. As Justice Stevens noted in *Cipollone*, "a contractual requirement, although only enforceable under state law, is not 'imposed' by the state, but rather is 'imposed' by the contracting party itself." 112 S. Ct. at 2622 n. 24. American's quotation from *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) does not counter the principle that distinct remedies may have differing levels of regulatory effect, with different results in pre-emption analysis. The quote from *Ouellette* was dicta; the Court's holding was based on the specific facts of the case.

II. THE *WOLENS* DECISION DOES NOT CONFLICT WITH ANY POST-*MORALES* CASES.

Just as American invented the specious issue that Illinois created a new legal standard based on the word "essential", so it has manufactured specious claims of conflict between *Wolens* and cases from circuit courts of appeals.

A. The Cases Relied On By American Do Not Address Federal Pre-emption With Respect To Frequent Flyer Programs, Thus Those Cases Do Not Conflict With *Wolens*.

As *Morales* was decided less than two years ago, it should not be surprising that there are a relatively small

number of Section 1305 pre-emption cases applying *Morales*. Of the post-*Morales* state high court and federal appeals court cases, *Wolens* is the only one to determine whether claims based on frequent flyer programs are pre-empted.[7] Because *Morales* prescribed a factual analysis to determine whether a claim is pre-empted, there is no potential for conflict between a decision based on frequent flyer programs and those based on other facts.

B. *Wolens* Does Not Conflict With Other Cases Either In Approach Or In Result.

1. The post-*Morales* cases generally follow the same approach as *Wolens*.

Numerous federal courts interpreting Section 1305 since *Morales* have found that Section 1305 does not pre-empt all state claims. These cases, just like *Wolens*, applied the analysis of *Morales* to their unique facts. And the facts in these cases, like the facts here, involved claims that were so remote from airlines' rates, routes and services that they were not pre-empted. *See, e.g., West v. Northwest Airlines, Inc.*, 995 F.2d 148, 151 (9th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3551 (1994) (claim for compensatory damages based on bumping was only tenuously connected to airline services and therefore was not pre-

[7] The only lower court case cited by American which refers to frequent flyer programs is *Schaefer v. Delta Air Lines, Inc.*, No. 92-1170-E (LSP) (S.D.Cal. Sept. 18, 1992). The *Schaefer* court allotted a mere two paragraphs to the pre-emption issue, and dismissed plaintiff's claim, based on numerous pleading defects, not only pre-emption. Moreover, unlike this case, *Schaefer* involved claims regarding misleading advertising.

empted); *Chouest v. American Airlines, Inc.*, 839 F. Supp. 412 (E.D.La. 1993) (state law claims arising from plaintiff's injuries incurred during ground transportation provided in American vacation package were not pre-empted under *Morales* because ground transportation was ancillary to American's airline services).[8]

2. *Wolens* does not conflict with the federal appellate court decisions cited by American.

The *Wolens* decision does not conflict with the Seventh Circuit's decision in *Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir.), *cert. denied*, 114 S. Ct. 603 (1993). That case involved American's policy toward cancelled ticket refunds: the amount of the rate charged by American which would be refunded if the customer cancelled the flight ticket. With no analysis, the court found it obvious that a case relating to ticket pricing was sufficiently related to airline rates as to be pre-empted.

In the Petition, American argues that the Seventh Circuit in *Statland* decided the general issue of whether

[8] *See also Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993) (despite federal design standards, common law claims regarding defective design of aircraft seat were not pre-empted); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 291 (1993) (same); *Stewart v. American Airlines, Inc.*, 776 F. Supp. 1194, 1197-98 (S.D.Tex. 1991) (claims for injuries occurring during flight were not pre-empted); *Bayne v. Adventure Tours USA*, 1994 U.S.Dist. LEXIS 413 (N.D.Tex. Jan. 13, 1994) (state law claims from airline employees' misrepresentations to police about plaintiff's actions during flight were not pre-empted).

damage claims under the Consumer Fraud Act and contract law were pre-empted. But in its Brief In Opposition To Petition For Writ Of Certiorari in *Statland*, American provided a more honest appraisal of the issue: whether the Court should review a decision that the plaintiff's state law claims arising out of partial refunds for discounted and restricted air travel tickets are pre-empted, Opp. App. at 9a, 10a. In that brief, American highlighted the very facts that distinguish this case from that one: "Statland's case involves the actual collection and refund of the fare itself, presenting an even closer connection to airline rates, and a clearer case for pre-emption, than *Morales*." Opp. App. at 18a. This case, by contrast, has nothing to do with the actual collection or refund of the fare for air travel services. Thus, *Wolens* and *Statland* are not in conflict. Both cases applied *Morales'* factual approach; their factual differences justified different results with respect to pre-emption.[9]

American's effort to create a conflict between the decision below and the Seventh Circuit's decision in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990), is futile. In *Illinois Corporate Travel*, the court held that federal law pre-empted a travel agency's state law claims relating to limits on price advertising since price advertising clearly related to American's rates. *Id.* at 754. Contrary to American's argument, *Illinois Corporate Travel*

[9] Contrary to American's disingenuous argument and misquotes of *Statland* (Petition at 25), that case never addressed the question of the form of relief. Thus, *Statland* does not conflict with *Wolens* on that issue.

does *not* hold that all state law contract or Consumer Fraud Act claims are pre-empted by Section 1305. Indeed, the court declined to express an opinion on whether Section 1305 would pre-empt state law claims to remedy other wrongdoing. *Id.* at 754-55. Since this case involved facts completely distinct from those in *Illinois Corporate Travel*, the purported conflict between the two decisions is imaginary.

American's claim of a conflict between this case and *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993), *petition for reh'g en banc granted*, 12 F.3d 426 (5th Cir. 1993), is curious. While *Hodges* found that a tort claim for physical injury was pre-empted by Section 1305 based on a previous unpublished opinion, the Fifth Circuit stressed that it believed the unpublished opinion was wrong and urged *en banc* review, which is pending. Thus, there is good reason to believe that *Hodges* will be reversed. In any event, *Hodges* is not settled and provides no basis for asserting a conflict justifying review.

Equally important, the *Hodges* court's analysis in attacking the unpublished opinion supports *Wolens*. In particular, *Hodges'* careful analysis of the ADA resulted in its conclusion that "the nature of the 'services' preempted by Section 1305(a) is more narrow than might at first be supposed." *Id.* at 353.

> "Services" generally represent a bargained-for or anticipated provision of labor from one party to another. . . . Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink,

> and baggage handling, in addition to the transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline. It is these features of air transportation that we believe Congress intended to deregulate as "services" and broadly to protect from state regulation.

Id. at 354. The *Hodges* court explained that this definition of services was consistent with Congressional intent regarding Section 1305 as well as with the Civil Aeronautic Board's understanding of the ADA. *Id.* at 354-55. *See, e.g.*, Civil Aeronautics Board, Statement of General Policy, Implementation of Preemption Provisions of the Airline Deregulation Act of 1978, 44 Fed. Reg. 9948, 9951 (Feb. 15, 1979). *See also Stewart*, 776 F. Supp. at 1197. *Hodges* concluded that claims involving an airline's business separate from its basic flight services were peripheral to airline services and should not be pre-empted by Section 1305.[10]

Nor does this decision conflict with *Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2956 (1992). In *Federal Express*, decided before *Morales*, the court determined that regulations affecting the services of Federal

[10] American deceptively quotes from *Hodges*. Taking a phrase out of context, American argues that *Hodges* held that Section 1305 pre-empts all state claims relating to "the contractual arrangement between the airline and the user of the service." Petition at 23. But American omits the context of this quote showing that the "contractual arrangement" and "services" which *Hodges* referred to were the contract and service of airline travel.

Express' trucks were pre-empted. The case did not evaluate frequent flyer clubs, and it made no general rulings as to what kinds of airline services lead to pre-emption. American argues that if the Ninth Circuit applied the same approach used in *Wolens* it would have found no pre-emption since, according to American, "the ground transportation services of an air express delivery service are not essential elements of airline operations." But the Ninth Circuit found just the opposite, concluding that the ground transportation services *were* essential to Federal Express' operations. *Id.* at 1079. Far from presenting a conflict with *Wolens*, *Federal Express* supports *Wolens'* consideration of whether services are essential to an airline as a factor in determining pre-emption.

Finally, American's contention that the Illinois Supreme Court's decision conflicts with the Ninth Circuit's holding in *West* that punitive damages were pre-empted is a "red herring." The Illinois Supreme Court's decision does not address punitive damages, and the issue was not briefed by the parties below.

III. THE ILLINOIS SUPREME COURT'S RULING DOES NOT CONFLICT WITH DOT INTERPRETATIONS OF SECTION 1305.

American contorts the pronouncements of the Department of Transportation ("DOT") to manufacture a purported conflict between DOT and the decision in *Wolens*. In fact, DOT's ruling in *Complaint and Rulemaking Petition of Association of Discount Travel Brokers*, Docket Nos. 46280, 47539 (DOT Order May 29, 1992) is fully consistent with *Wolens* and the airlines' arguments in that

matter support plaintiffs' position here. The Association of Discount Travel Brokers, whose members purchase and sell frequent flyer awards, sought to require DOT to establish nationwide standards for frequent flyer programs. App. at 90a-91a. In opposing the proposed rulemaking, American argued, among other things, that DOT lacked jurisdiction to regulate frequent flyer programs since those programs extend beyond airlines. App. at 92a-93a.

Further, the airlines stressed that their agreements with members of their frequent flyer programs, which prohibit the purchase and sale of frequent flyer awards, were "valid and enforceable contractual restrictions on assignment. . . ." App. at 91a. They described their frequent flyer programs as "legitimate contract[s]" governed "solely by contract law." App. at 89a. DOT agreed:

> Continental correctly describes the relationship between frequent flyer programs and their members as a *contract* in which the carrier offers to provide benefits subject to the program's terms and conditions and the participant accepts the offer by joining the program and flying on the carrier.

App. at 96a (emphasis added).

Contrary to American's argument, DOT did not conclude that an air carrier can breach its contractual obligations without being held liable for money damages under state law. DOT's statement that certain methods of controlling the cost of frequent flyer programs may be legitimate is not inconsistent with *Wolens*. Plaintiffs do not argue – and the *Wolens* decision did not find – that

airlines' methods for controlling costs are per se illegitimate. Plaintiffs do argue – and the *Wolens* court agreed – that if American's institution of cost controls breaches a contract, American can be held liable for damages under state law. Nothing in the DOT order contradicts this finding.

American relies on a quotation from the DOT order, which it describes as an "interpretation of the preemptive scope of Section 1305". Petition at 28. In fact, DOT's statement mirrors the "relating to rates, routes and services" language of Section 1305; DOT does not interpret it. *See* App. 102a. It is left to lower courts to determine whether state law claims relate to rates, routes or services under *Morales*.

A finding of pre-emption would leave members of the AAdvantage Program with no remedy whatsoever, state or federal, for American's breach of contract.[11] Accepting American's argument that plaintiffs' damage claims are pre-empted would give air carriers *carte blanche* to breach any contract to which they are parties – whether it is a contract with a supplier of aircraft parts or a contract with members of a frequent flyers club. Such an absurd result is not mandated by Section 1305.

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[11] Federal common law is an unlikely source of recovery. *See Miree v. DeKalb County, Ga.*, 433 U.S. 25, 28-33 (1977) (holding that federal common law did not apply to contract dispute between county and Federal Aviation Administration).

IV. THE DECISION OF THE ILLINOIS SUPREME COURT DOES NOT RAISE ANY IMPORTANT FEDERAL QUESTION WHICH WARRANTS REVIEW BY THIS COURT.

Whether some courts are struggling with how to apply *Morales'* analytical framework for pre-emption, as American contends, is irrelevant. Only when such struggles result in irreconcilable conflicts or create unusual pivotal points of federal law is plenary review called for.

The conclusion by the court below that Section 1305 does not pre-empt plaintiffs' state law breach of contract and consumer fraud damage claims was the result of a fact-sensitive analysis as required by *Morales*. The individualized nature of the inquiry indicates that it will not have far-reaching ramifications for other cases. The purported conflicts with United States Courts of Appeal and with DOT are illusory, as explained *supra*. Thus, the *Wolens* decision presents neither an irreconcilable conflict nor a pivotal point of federal law. Plenary review is not justified.[12]

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[12] American argues that the Court should review this decision because allowing it to stand could subject American to other suits by frequent flyers in Illinois and other states, with severe economic consequences to American. Virtually every person charged with damage liability could make that argument, but it would not justify review. American tries to set the airline industry apart, implying that the industry is so important that the Court should protect it from damage claims based on its own breach of contract and fraud. If every "important" industry in this country were protected from damage suits, the law of contract would be obliterated.

Ironically, in its Petition, American extols the market virtues of deregulation. *See* Petition at 3, 14, 16. And in the DOT proceeding, American contended that "market forces are in a better position than the Department to correct any perceived abuses in the frequent flyer program." App. at 93a. Yet, American's transparent goal here is to avoid the market consequences of its actions. The free market economy has long included the principle that those who breach contracts or defraud others will be liable for damages. American presents no evidence that Congress, in adopting Section 1305, intended to eviscerate the checks and balances of the free market.

It is telling that the airlines, including American, have often brought state law claims against coupon brokers for breach of contract based on their purchase and resale of frequent flyer program credits. *See American Airlines v. Christensen*, 967 F.2d 410, 412 (10th Cir. 1992); *TransWorld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676, 689 (9th Cir. 1990); *American Airlines, Inc. v. American Coupon Exchange, Inc.*, 721 F. Supp. 61, 62 (S.D.N.Y. 1989). Evidently, American is willing to invoke state law breach of contract remedies when it wants to enforce the terms of the AAdvantage Program, but seeks to evade state law when members want to enforce the Program's terms.[13]

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[13] American complains that it will have to abide by Illinois law if plaintiffs' damage claims stand. This is only appropriate since American breached contracts with and defrauded Illinois residents. Moreover, Illinois contract and fraud law does not differ significantly from other states' comparable laws, and the Illinois courts may determine the claims of non-resident class members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

V. AMERICAN'S STATEMENT OF ISSUES IS IMPROPER.

American identifies two issues as the questions on appeal should the Court grant the Petition. The questions as framed by American would take the Court far beyond the Illinois Supreme Court's ruling. The Court should not take on appeal issues "not pressed or passed upon in the state court." *Heath v. Alabama*, 474 U.S. 82, 87 (1985).

American frames the first issue as whether Section 1305 "preempt[s] only those state law claims that relate to 'essential' airline operations". Petition at (i). But *Wolens* made no such general ruling on the operation of Section 1305. Nor did it create a litmus test for pre-emption claims based on the term "essential." *See supra* at 11-13. American's second purported issue attempts to put in question another issue not decided by the lower court. Framing the question very generally, American asks whether Section 1305 pre-emption depends on the form of relief requested. This question, like the first one, was not addressed by the Illinois Supreme Court. Moreover, to rule on that issue, the court would have had to go far beyond the instructions of this Court on remand. *See Kotler v. American Tobacco Co.*, 981 F.2d 7, 13 (1st Cir. 1992)

American's argument that Illinois is establishing national standards and imposing its regulations on other states, in violation of the Commerce Clause, is wrong. This is a private civil suit, not a government regulatory action, and no injunctive relief will be awarded. The state of Illinois will not impose any regulations, let alone national regulations, on the airlines. *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), relied on by American, involved a statute that discriminated against interstate commerce; the case has no application here.

(on remand, court should confine inquiry to matters within specific scope of remand).

If the Court grants certiorari in this case, the only proper issue presented will be one based on the Illinois Supreme Court's actual ruling: Did the Illinois Supreme Court correctly apply the *Morales* test in determining that Section 1305 does not pre-empt state law claims arising out of American's breach of contract and fraud in connection with its AAdvantage marketing club, because the claims based on the AAdvantage club are too tenuous, remote or peripheral to airline rates, routes and services to warrant pre-emption?

CONCLUSION

For all the reasons set forth above, the Petition for Certiorari filed by American Airlines, Inc. should be denied.

Respectfully submitted,

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March 10, 1994

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

WOLENS, et al., Plaintiffs, v.
AMERICAN AIRLINES, INC.,
Defendant

No. 88 C 8158

[October 24, 1988, Decided; October 25, 1988, Filed]

JOHN A. NORDBERG, UNITED STATES DISTRICT JUDGE

Plaintiffs' state class action complaint alleged that changes instituted in defendant's "American AAdvantage" frequent flyer program constituted a breach of contract and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. Ann. ch. 121½ para. 261 *et seq.* (Smith-Hurd Supp. 1988). Defendant removed to this Court from the Circuit Court of Cook County on the grounds that the complaint raised a federal question exclusively committed to the adjudication of the federal courts pursuant to § 105(a)(1) of the Federal Aviation Act (FAA), 49 U.S.C. § 1305(a)(1), and thus the case arose under federal law. *See* 28 U.S.C. §§ 1331, 1441(b).

Plaintiffs duly moved to remand with costs and attorneys fees for improvident removal. The Court now grants their motion for remand and for costs.

In opposing remand, defendants primarily argue that the case was properly removed under the doctrine of complete preemtion [sic] and attempt to demonstrate to the Court that the FAA indeed preempts the state claims.

Their arguments are not persuasive and fail under the analysis dictated by controlling precedent. *See Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542 (1987).

Few requirements of federal jurisdiction are more firmly established than the well-pleaded complaint rule, which holds that "a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." *Id.* at 1546. Since federal preemption generally constitutes a defense to a claim, it does not arise on the face of the complaint and consequently does not permit removal. *Id.* After all, the defendant can make its preemption defense just as easily to the state court as it can to the federal court.

One preemption-related qualification to the well-pleaded complaint rule, however, results when Congress has so completely preempted an area that any complaint concerning it "is necessarily federal in character." *Id.* In such cases, preemption is not properly viewed as a defense because any claim regarding the preempted subject matter is automatically deemed federal, and thus the complaint itself raises an issue of federal law.

But in deciding whether a claim is necessarily federal in character, a court is not to employ the ordinary preemption analysis that determines whether federal law preempts state law. That would be reaching the merits before determining the court had jurisdiction to act. *Cf. Kanzelberger v. Kanzelberger*, 782 F.2d 774, 776-77 (7th Cir. 1986). Instead, what a court must determine is whether Congress intended to make any action concerning the federally governed area an action arising under federal

law, even if the plaintiff's well-pleaded complaint raises only state-law claims. As the Supreme Court explained in *Metropolitan* with respect to the Employee Retirement Income Security Act (ERISA):

> [T]he touchstone of the federal district court's removal jurisdiction is not the 'obviousness' of the pre-emption defense but the intent of Congress. Indeed, as we have noted, even an 'obvious' pre-emption defense does not, in most cases, create removal jurisdiction. In this case, however, Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of [ERISA] § 502(a) removable to federal court. Since we have found [plaintiff's] cause of action to be within the scope of § 502(a), we must honor that intent whether pre-emption was obvious or not at the time this suit was filed.

107 S. Ct. at 1548. As the quoted passage indicates, the party urging *Metropolitan* preemption must demonstrate congressional intent to make any claims falling within the scope of the federal statute *removable* to federal court. Justice Brennan emphasized this point in concurrence: "In future cases involving other statutes, the prudent course for a federal court that does not find a *clear* congressional intent to create removal jurisdiction will be to remand the case to state court." *Id.* (emphasis in original).

In the instant case, defendant has pointed to no legislative history indicating a congressional intent to make any claim arguably falling within the scope of the FAA removable to federal court. Instead, defendant has pointed to the "sweeping" preemption provision of 49 U.S.C. § 1305(a)(1), which provides that "no State or political subdivision thereof and no interstate agency or

other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." *See also* 49 U.S.C. §§ 1302(a)(7), 1381(a). The only legislative history it has cited is a House report related to the Civil Aeronautics Board Sunset Act of 1984. The report notes:

> In addition to protecting consumers, federal regulation ensures a uniform system of regulation and pre-empts regulation by the states. If there was no federal regulation, the states might begin to regulate these areas, and the regulations would vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

H.R. Rep. No. 98-793, 98th Cong., 2d Sess. 4 (May 21, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2857, 2860.

Whatever relevance the statute and legislative history have to the question whether the FAA creates a preemption defense to plaintiffs' state contract and fraud claims, they in no way indicate a congressional intent to convert these state claims into federal actions removable to federal court. Furthermore, defendant has cited no case holding that Congress intended the FAA to have that effect. In fact, as far as the Court can tell from the parties' submissions, the only areas in which Congress has been found to have intended this conversion of state law claims involve disputes preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and by

ERISA, 29 U.S.C. § 1001 *et seq. See Metropolitan; Avco Corp. v. Machinists,* 390 U.S. 557 (1968).[1]

Moreover, the legislative history relied upon by the Supreme Court in finding intent for complete preemption with regard to ERISA stands in sharp contrast to the report cited by defendant in this case. The ERISA report stated:

> [W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. *All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.*

Metropolitan, 107 S. Ct. at 1547 (quoting H.R. Conf. Rep. No. 93-1280, at 327 (1974) (emphasis in original). As discussed in the text above, this report indicates an intent to make any claim falling within the subject matter of the relevant statutory provisions a claim arising under federal law, and thus removable. The legislative report cited

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[1] Defendant contends that "[t]he Supreme Court's recent decisions . . . confirm . . . that the complete pre-emption doctrine is no longer limited to labor cases." Defendant's Response, at 13 n.8. That is true. The doctrine now extends to ERISA cases. *See also Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974) (state law complaint alleging right to possession of Indian lands necessarily arises under federal law). But defendant has cited no case outside these narrow areas in which the complete pre-emption doctrine has been held applicable.

by defendant, by contrast, merely states the obvious – federal regulation preempts state regulation.

Furthermore, the Court notes that the plain language of the FAA even cuts against defendant's contention that the act gives rise to a general preemption defense. *See* 49 U.S.C. § 1506 ("Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.") *See also Nader v. Allegheny Airlines,* 426 U.S. 290 (1976) (common law fraudulent misrepresentation action against airline should not be stayed pending Civil Aeronautics Board determination of whether overbooking is deceptive under FAA § 411); *Wolsi v. American Airlines, Inc.,* 668 F. Supp. 1117 (N.D. Ill. 1987) (section 1305 does not preclude state courts from hearing breach of contract actions against airlines). While it is not wholly inconceivable that defendant can make out a preemption defense to defeat plaintiffs' claims on the merits in the state court,[2] it cannot plead preemption to remove to this Court.

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[2] Actually, defendant's preemption argument appears to face an uphill struggle in the state courts. Plaintiffs have cited a pending state court case in which another airline, represented by defendant's counsel here and facing a challenge to its flight promotion program, unsuccessfully moved to dismiss the part of the state law complaint based upon the Illinois consumer protection act on grounds of FAA preemption. *Sherman et al. v. Northwest Airlines, Inc.,* No. 87 CH 9010 (Cook County Circuit Court March 31, 1988). The *Sherman* case, like this case, also contains a breach of contract count. Plaintiffs report that three other such cases also are pending in Circuit Court of Cook County. *Rivkin v. Northwestern Airlines, Inc.,* No. 88 CH 2637; *Ryan v. Delta Airlines,* No. 88 CH 4846; *Zabka v. United Airlines,*

Defendant does, however, make two slightly different arguments in an attempt to keep this case in federal court. The first of these arguments is that plaintiffs somehow "artfully pleaded" a federally based claim in the guise of state contract and fraud claims. The sole authority that defendant cites for this argument is *Lingle v. Norge Division of Magic Chef, Inc.,* 823 F.2d 1031 (7th Cir. 1987) (en banc).

Initially, the Court admonishes defense counsel for citing authority without indicating that it has been reversed, as is true of *Lingle. See Lingle v. Norge Division of Magic Chef, Inc.,* ___ U.S ___, 108 S. Ct. 1877 (1988).[3] While a federal claim cannot masquerade as a state law claim through the expedient of artful pleading, the Court has carefully examined the complaint, and concludes that it only pleads what it purports to plead – state law contract and fraud claims. *See Saturday Evening Post Co. v. Rumbleseat Press, Inc.,* 816 F.2d 1191, 1194-95 (7th Cir. 1987).

Defendant's final argument is that plaintiffs' complaint may be removed because it arises under federal common law. This argument is largely a rehash of defendant's preemption argument.[4] In any event, defendant

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87 CH 3353. Plaintiffs inform the court that none of these cases has been removed to the Northern District of Illinois.

[3] If counsel's point was that the reversed case is still good law for the proposition for which it is cited, counsel should be advised that the proper citation form is "reversed on other grounds."

[4] *See* Defendant's Response, at 15 ("Most of the numerous reasons which compel the application of federal common law in

cites no case in which state contract and fraud claims against airlines have been held to be governed by federal common law. Given the extremely limited play the federal common law enjoys, *see Barany v. Buller*, 670 F.2d 726 (7th Cir. 1982), the Court finds that this apparent state law case is not actually governed by the federal common law.

Accordingly, for the foregoing reasons, this case is remanded to the Circuit Court of Cook County. Pursuant to 28 U.S.C. § 1447(c), the Court awards plaintiffs the costs of this action.

ENTER:

/s/ John A. Nordberg
JOHN A. NORDBERG
United States District Judge

Dated: October 24, 1988

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this case have been discussed in other contexts above and need not be repeated here."). Defendant then proceeds to argue once more that the FAA should preempt plaintiffs' state law action.

APPENDIX B

No. 93-604

In The

Supreme Court of the United States

October Term, 1993

IRIS STATLAND,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant a petition for a writ of *certiorari* to review the Seventh Circuit Court of Appeals' decision that Petitioner's state law claims, arising out of Respondent American Airlines' partial refunds for discounted and restricted air travel tickets, "relate to" airline rates and therefore are pre-empted by the Airline Deregulation Act.

RULE 29.1 STATEMENT

Respondent American Airlines, Inc. is wholly owned by AMR Corp., a Delaware Corporation, and owns 49% of DFW Terminal Corp., a Texas corporation.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a dispute between an airline and a passenger regarding $1.25 that Petitioner Iris Statland claims should have been returned to her as part of a ticked refund. Statland purchased a discount ticket for air travel from Respondent American Airlines, Inc. ("American"). Statland paid $138.00, which included the federal aviation tax on airfares, for a round trip ticket from Chicago to New York. Statland knew that the ticket was subject to a 10% Service Charge upon cancellation. Statland cancelled her travel and sought a refund from American. American refunded $124.20 to Statland,

retaining $13.80 (10%) of the $138.00 ticket price as a Service Charge. Statland claims that because American's advertisements and other published notices did not explicitly disclose that its 10% cancellation penalty applied to the total ticket price, American was not entitled to withhold any portion of the tax component of the fare and an additional $1.25 should have been refunded.

On April 2, 1992, Statland filed a five-count complaint against American in the United States District Court for the Northern District of Illinois. The first count of Statland's complaint alleged that American violated Section 411(b) of the Federal Aviation Act ("Aviation Act"), 49 U.S.C. § 1381(b) (Supp. 1992), and regulations promulgated thereunder, because American allegedly did not provide sufficient notice that its cancellation penalties were based upon the total ticket price, including the tax component. Statland also asserted four counts arising under Illinois state law: breach of fiduciary duties (Count II); violation of Section 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2 (1992) (Count III); conversion (Count IV); and breach of contract (Count V).

The district court reviewed the complaint and, *sua sponte*, dismissed the entire action on April 6, 1992. The district court held that no private right of action, express or implied, exists under Section 411(b) of the Aviation Act. With the sole basis of federal jurisdiction thus eliminated the district court declined to exercise supplemental jurisdiction and dismissed without prejudice the four state law claims. After unsuccessfully petitioning the district court for reconsideration of its

order of dismissal, on May 5, 1992, Statland filed a notice of appeal with the United States Court of Appeals for the Seventh Circuit.

On July 16, 1993, the Seventh Circuit affirmed the decision of the district court. The appellate court agreed that there is no private right of action under Section 411(b) of the Aviation Act, 49 U.S.C. § 1381(b), and Statland has not challenged that ruling in her Petition before this Court. After the district court had dismissed Statland's claim, but before the parties had filed their appellate court briefs, this Court issued its decision in *Morales v. Trans World Airlines, Inc.*, ___ U.S. ___, 112 S. Ct. 2031 (1992), holding that Section 1305(a)(1) of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 1305(a)(1) (Supp. 1992), broadly pre-empts all state law claims having any "connection with or reference to" an air carrier's "rates, routes, or services." The Seventh Circuit dismissed Statland's state law claims with prejudice, ruling that it is "obvious" that those claims are pre-empted by Section 1305(a)(1) of the ADA.

REASON FOR DENYING THE WRIT

The Decision of the Seventh Circuit below is a correct application of the Airline Deregulation Act's pre-emption provision, as recently explained by this Court in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992).

Section 1305(a)(1) of the ADA is a broad pre-emption provision, holding that no State

> shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . . .

49 U.S.C. § 1305(a)(1). The relevant issue below was whether Statland's claims "relat[e] to rates, routes, or services" of American.

The basic legal principles that control this case were the subject of detailed consideration by this Court last year in *Morales v. Trans World Airlines, Inc.*, ___ U.S. ___, 112 S. Ct. 2031 (1992). In *Morales*, this Court addressed the threatened enforcement by various state attorneys general of advertising guidelines promulgated under state consumer protection statutes. Significantly, the guidelines would have required airlines to include all taxes and surcharges within their advertised fares. 112 S. Ct. at 2039. This Court evaluated the advertising guidelines to determine whether they were pre-empted by Section 1305(a)(1) of the ADA. Relying upon ERISA decisions interpreting the same "relating to" language in that statute's pre-emption provision, 29 U.S.C. § 1144(a), this Court held that Section 1305(a)(1) is expansive in scope, and pre-empts any "State enforcement actions having a connection with or reference to airline 'rates, routes, or services.' " 112 S. Ct. at 2037. Applying those principles, this Court in *Morales* concluded that the advertising restrictions that the state attorneys general sought to impose had a clear connection with airline rates and were pre-empted.

In considering Statland's claims under Section 1305(a)(1) of the ADA, as interpreted by this Court in *Morales*, the Seventh Circuit correctly found Statland's

state law claims to be pre-empted by the ADA. Like *Morales*, this case challenges an airline's advertisements and other published notices of the terms and conditions of discount airfares. The four state law claims that Statland asserts against American all arise from American's alleged failure adequately to inform Statland of the conditions that applied to the discounted fare. Specifically, Statland complains that American's advertising and other notices misled her about the amount of the total ticket price that she would forfeit as a penalty if she canceled her flight. Statland's state law claims attempt to punish American for alleged wrongdoing in retaining money ($1.25) Statland paid for an air travel ticket; as the Seventh Circuit noted, "[w]e think it obvious that canceled ticket refunds relate to rates." (Petitioner's Appendix at App. 6.)

Statland seeks to avoid this "obvious" conclusion by suggesting that her state law claims relate not to the fares American charges for air travel, but to the aviation taxes imposed by the Federal government. (Petition at 4-5.) To support her position, Statland is forced to argue, without legal or logical support, that the "rate" charged by American is only the fare set by American, but that the federal taxes which are required by law to be assessed are not part of the "rate." Statland must stretch further to suggest that taxes on airline tickets do not even have a "connection with or reference to" airline rates. Those arguments are directly foreclosed by *Morales*, in which this Court concluded that disclosure of taxes and surcharges pertaining to advertised fares "relates to"

rates. The Seventh Circuit correctly held that Section 1305(a)(1) preempts Statland's state law claims.[1]

Having no plausible argument that the Seventh Circuit erred (Statland's Petition nowhere asserts that the appellate court's decision was erroneous), Statland attempts to justify this Court's attention by arguing that the decision below conflicts with the decision of the Ninth Circuit in *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993). Even if *West* is a dubious application of *Morales*, *certiorari* is not warranted here because the decision below falls squarely within the scope of *Morales*. Although *Morales* recognized that some "borderline" cases might arise at the margin under the "relating to rates, routes, or services" language of Section 1305(a)(1) of the ADA, Statland's case is nowhere near the margin. Indeed, where *Morales* involved the advertising of fares,

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[1] Indeed, the Seventh Circuit addressed the substance of Statland's state law claims precisely because they are so patently defective. The district court rejected Statland's claim under the Federal Aviation Act and declined to exercise supplemental jurisdiction over her state law claims. Subsequently, this Court issued its decision in *Morales*. The Seventh Circuit concluded that the existence of a clearly meritorious pre-emption defense, established by *Morales*, permitted the Seventh Circuit to exercise supplemental jurisdiction over, and dismiss, Statland's state law claims. *See DeBruyne v. Equitable Life Assurance Society*, 920 F.2d 457, 468 n.23 (7th Cir. 1990). This peculiar procedural posture means that, technically, the only issue properly before this Court is whether the Seventh Circuit abused its discretion by exercising supplemental jurisdiction, an issue not even addressed in Statland's Petition. Thus, even if the Court were to grant review, it is far from clear that the Court could resolve the question presented or that it could grant the relief Statland seeks.

Statland's case involves the actual collection and refund of the fare itself, presenting an even closer connection to airline rates, and a clearer case for pre-emption, than *Morales*. The decisions of other courts are of no moment where, as here, the conclusion that the Seventh Circuit reached is so obviously compelled by the language of Section 1305(a)(1) and *Morales*.

CONCLUSION

The Petition for writ of *certiorari* should be denied.

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